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No. 79-1996

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

DISTRICT ATTORNEY FOR THE COUNTY OF SACRAMENTO,
Petitioner

vs.

THE SACRAMENTO COUNTY CIVIL SERVICE COMMISSION, and
THE SACRAMENTO COUNTY BOARD OF SUPERVISORS,
Respondents

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I

PETITIONER PROPERLY INCLUDED, AND REFERRED TO, THE OPINIONS OF THE LOWER STATE COURT DECISIONS

Rule 23, Section (k) of the Rules of the Supreme Court of the United States requires that a Petition for Writ of Certiorari contain a "copy of any opinions delivered upon the rendering of the judgment or decree sought to be reviewed, including all opinions of courts or administrative agencies in the case, . . ." Further, Section (f) requires that the Petition specify how, in what manner, and at what stage, the federal questions were raised in the courts below.

Obviously, Petitioner's reference to the California District Court of Appeal decision was not only not misleading, but was required.

II

BECAUSE COMMISSION RULE 7.10 IS IN EFFECT AND AUTHORIZES FURTHER QUOTA HIRING ORDERS AGAINST PETITIONER, THE CONTROVERSY IS NOT MOOT

Commission Rule 7.10 (hereinafter Rule) is in full force and effect and capable of authorizing further quota hiring orders against Petitioner and, therefore, the controversy between the parties is not moot. The Respondents assert that the matter is moot because the Commission's Order of September 25, 1975, (hereinafter Order) is no longer in existence in that:

> a. the percentage of minority attorneys in Petitioner's office in the relevant classes reached the Order's quota of 8% numerous times during the pendency of the action; and
>
> b. the Civil Service Commission (hereinafter "Commission") rescinded the Order on April 24, 1980.

Respondent's totally overlook that the *central issue in this controversy* is the constitutional and statutory *validity of Rule 7.10,* and not the Order which the Rule authorized. The Trial court held that the Rule itself, as distinguished from the Order, was unconstitutional on its face. The District Court of Appeal determined that it violated the federal Civil Rights Act. The California Supreme Court then found it statutorily and constitutionally valid under state and federal law. Any inoperation or rescission of the particular Order which precipitated this lawsuit has absolutely no effect on the viability of the dispute between the parties over the validity of the Rule. *Although the Order may have died, the Rule lives.*

It is interesting to note, that while this matter was pending in the state courts (for over four years) the Respondents at no time either raised the mootness issue or rescinded the Order. According to the Inter-Department

Correspondence dated April 3, 1980 (Respondents' Brief, Exhibit A-6), the required minority hiring quota of 8% or more was reached at least as early as September 22, 1977*, and yet neither the mootness issue was raised, nor the Order rescinded, *until after the California Supreme Court decision became final on March 20, 1980.* It is obvious that the Commission's Rescission Order was simply a means of attempting to weaken Petitioner's position in seeking review by this court. It is equally obvious that justice dictates such tactical maneuvers should be ignored.

Even if the validity of the Order were the central issue (which it is not), it is well settled that voluntary abrogation of such orders, which are central to a dispute, should not be permitted to frustrate a meritorious resolution of the issues. To prevent that very tactic, this court has held that a mootness claim will not lie where the orders involved are "capable of repetition, yet evading review" if "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Securities and Exchange Commission v. Sloan* 436 U.S. 103, 108-109 (1978).

A somewhat parallel issue arose in *Keyishian v. Board of Regents,* 385 U.S. 589 (1967). In that case, a state board of regents propagated a loyalty oath under authority of a statutory and regulatory scheme, the required signing of which was a condition of employment. Prior to the trial, the particular disclaimer requirement was withdrawn. However, the underlying authority for such conditions remained in existence. This court held that "(t)he change

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*The Correspondence shows 3 minority attorneys out of 24 in the Attorney I and II classes, or 12.5%.

in procedure in no wise moots appellants' constitutional questions raised in the context of their refusal to sign the now abandoned" oath. (385 U.S. at 596).

The inherent problem presented by short term and rescinded orders was also addressed in *Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976). It dealt with the validity of a judicial order restricting pretrial publicity which expired on its own terms upon impanelment of the jury. The trial was already completed when this court rejected the mootness argument because the issue of restrictive orders was capable of repetition.

Numerous other cases have rejected a claim of mootness under similar circumstances, *Gannett Company, Inc. v. De Pasquale,* 443 U.S. 368 (1979); *Division 1287 of the Amalgamated Association of Street Electric Railway and Motor Coach Employees of America v. State of Missouri,* 374 U.S. 74 (1974); *Allee v. Medrano,* 416 U.S. 802 (1974).

This court has noted that "(t)he difference between an abstract question and a 'case or controversy' is one of degree, of course, and is not discernible by any precise test." *Babbitt v. United Farm Workers,* 442 U.S. 289, 297 (1979). However, where concrete issues are generated by a real and substantial controversy, the test is met. The dispute as to whether the Rule and the orders it authorizes are statutorily and constitutionally valid is definite and concrete.

The burden of demonstrating mootness "is a heavy one" *County of Los Angeles v. Davis,* 440 U.S. 625, 631 (1979). This burden clearly has not been met.

III

PETITIONER HAS STANDING TO CHALLENGE THE VALIDITY OF RULE 7.10

The California District Court of Appeal held under the "law of the case" doctrine by the California Supreme Court, that the Petitioner has standing to challenge a civil service restriction upon his power to appoint deputies upon their relative merit. *Price v. Civil Service Commission,* 26 Cal.3d, 257, 267 n.5d. Since the Petitioner is affected by the operation and implementation of Rule 7.10, he has a personal stake in the outcome and is entitled to attack it's constitutionality. *Board of Education v. Allen,* 392 U.S. 236 (1968).

Petitioner's standing is in no way affected by either the inoperation or rescission of the Commission's Order. As stated above, the Rule is alive and well. Where there is a continued interest in restraining the enforcement of a discriminatory law the controversy is concrete. *Hicklin v. Orbeck,* 437 U.S. 518 (1978). Respondent's bear a heavy burden in refuting the standing of Petitioner. *Warth v. Seldin,* 422 U.S. 490, 501 (1975).

Respondents' Brief stressed that the Order was never actually applied to Petitioner's office and therefore, somehow, the Petitioner lacks standing. The Order was not actually applied because Petitioner filed suit and sought and received a restraining order prohibiting the implementation of the Order. It is not meritorious to now argue that because the Order was never implemented, that Petitioner does not have standing to attack the Rule on statutory and constitutional grounds.

IV

THE MINORITY QUOTA HIRING PROGRAM AUTHORIZED BY RULE 7.10 IS NOT VOLUNTARY

Respondents maintain that the minority quota hiring program is "voluntary" since it could be applied to all county civil service employees. The California Supreme Court agreed, stating that the Petitioner's disagreement with the Rule "does not, of course, render the plan 'involuntary' any more than the disagreement of one of a private employer's foreman or department heads would render a plan adopted by the responsible official of such an employer involuntary." Such an argument ignores that the Petitioner, an elected official, has sworn responsibilities to his constituents to perform his duties *to the best of his ability.* He has an obligation to hire the *best qualified personnel available,* and the forced quota hiring program authorized by Rule 7.10 simply does not permit him the power to do so. It is irrational to claim that he is similarly situated to a "foreman" or a "department head", both of whom serve their private employer. The private employer chooses foreman and chooses department heads and has the authority to direct their work. The Petitioner, an elected District Attorney, is responsible to the citizens whom he serves and the laws he is sworn to uphold.

V

FULLILOVE v. KLUTZNICK INVOLVES SIGNIFICANTLY DIFFERENT ISSUES THAN THOSE PRESENTED IN THE INSTANT PETITION

The "minority business enterprise" provision of the Public Works Employment Act of 1977 upheld in the recent case of *Fullilove v. Klutznick,* ..... U.S. ....., 48 U.S. Law Week 4979 (1980) is dissimilar to the quota hiring program authorized by Rule 7.10. *Fullilove* involved a constitutional attack on a congressionally authorized federal aid pro-

gram. The program conditioned receipt of public works grants upon agreement by the grantee that at least 10 percent of the funds would be set aside for contracts with minority businesses.

This court, in *Fullilove,* repeatedly stressed the narrowness of the holding and stated, "(h)ere we pass, not on a choice made by a single judge or a school board but on a considered decision of the Congress and President. . . . The clear objective of the MBE provision is disclosed by our necessarily extended review of its legislative and administrative background. . . . The MBE program does not mandate the allocation of federal funds according to inflexible percentages solely based on race or ethnicity." 48 LW at 4986. The case was expressly limited to a consideration of congressional authority.

In the instant matter, Rule 7.10 permits the imposition, by a *local, non-elected Commission, of fixed racial quotas in government employment without regard to any other considerations.* Clearly, *Fullilove* does not affect the statutory or constitutional validity of a county civil service rule such as Rule 7.10

CONCLUSION

For the reasons discussed above, this case has not become moot; the Petitioner does have standing to attack the validity of Rule 7.10 in this Court; and the Petition for Certiorari should be granted.

Respectfully submitted,

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